IN THE

SUPREME COURT OF THE UNITED STATES.

JOHN H. GOETZE AND COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR,

AND SEVERAL SIMILAR CASES.

BRIEF ON BEHALF OF INDUSTRIAL INTERESTS IN THE STATES.

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No. 340.

JOHN H. GOETZE AND COMPANY, PLAINTIFFS IN ERROR, VS. THE UNITED STATES, DEFENDANTS IN ERROR, AND SEVERAL SIMILAR CASES. 340, ETC.

These suggestions are filed on behalf of individuals as deeply interested in the final determination of the questions involved as the Government itself.

A decision in these cases adverse to the Government would make it possible not only to suddenly endanger our revenues upon a mere *cession* of acquired territory—no one can say to what extent—without the consent of Congress, but it would jeopard a very large amount of capital invested in the States *in certain agricultural industries*, the protection and development of which it has long been the policy of the Government to safeguard in our customs-revenue laws. These industries, embracing tobacco, sugar, rice, hemp, fruits, etc., can not compete on the unequal terms which would be forced upon them with like products grown in ceded (tropical) possessions. No one can now say to what extent the United States may go or feel required to go, through the fortunes of war, in taking over ceded possessions. No one would have been bold enough to assert, at the inception of our last war, that a cession of Porto Rico and of the Philippines would be one of the results. Eventually Cuba may be taken in to safeguard our interests, or her people may finally vote for annexation. This case is far-reaching in its possible consequences to our fiscal, industrial, and labor interests. Heretofore our cessions have been of *contiguous* territory having scanty products and comparatively few people, who could be readily assimilated, etc. We have now *other and serious conditions* to deal with. The Union was of *States* for *their* protection first, and not, as too many seem to suppose, for the exercise of charity toward inhabitants who might or might not come to us by war.

Our treaty with Spain was ratified and promulgated April 11, 1899, embracing cessions of Porto Rico, Guam, and the Philippines, on dissimilar conditions in some respects. There was no attempt by Congress to legislate for Porto Rico until the passage of the acts approved March 24, 1900, and April 12, 1900. The contention is that upon the cession of territory goods therefrom are at once entitled to entry free of tax, when like and similar goods from *foreign* countries are subject to impost under our customs-revenue acts.

In other words, the theory is that the mere cession and acceptance made the islands *a part* of the United States for fiscal or revenue purposes; that immediately upon the ratification of the treaty and procla-

mation thereof (April 11, 1899) the Constitution extended over the islands *ex proprio vigore*, and that their inhabitants *eo instanter* became entitled to all the rights and privileges guaranteed by that instrument, among which is the provision (sec. 8, Article I) requiring that all duties, etc., "shall be *uniform throughout the United States*," and that the words "United States" comprehend ceded territory for the purposes of domestic as well as foreign commerce.

We thus stand upon the threshold of an investigation which will probably involve the consideration of several matters for its determination, among others—

1. What is the legal or constitutional significance of the word "uniform" as used in sec. 8 of Article I, in its application to the cases pending?

(*a*) What is the true interpretation of the words "United States"—(*Etats Unis*) when applied?

(*b*) As to the power of Congress to impose a tax on goods coming into the United States from ceded territory to which neither the Constitution nor our laws have been extended by Congress.

(*c*) Whether the tax collected here on Porto Rican products since ratification falls under the taxing clause at all. Whether it is not governed by the clause to regulate commerce, and the limitations thereon; whether it does not fall within the sovereign power over and the conceded right to make rules for territory.

THE "UNIFORM" AND OTHER CLAUSES.

A part of the taxing clause in the Constitution has been given a construction by this court.

8 Wallace, 123, p. 132; 100 U. S. Rep., 434.

This court there holds that the words imposts in sec. 8 and exports in sec. 9 refer only to *foreign* goods entering or going out of this country, while the question here is, whether goods from a province, district, dependency, island, or mere territory—not recognized as nor yet created *a* "territory"—to which neither the Constitution nor the body of our laws have been extended may, by mere act of cession, enter this country *duty free*.

It is doubtless true that it was not the intention of the framers to give the people in *such* territory nor of any of the organized territories the benefit of "free trade" in nor *lower* rates on *foreign* goods than we in the States paid, nor to give foreign nations such an advantage, involving as it would a loss of revenue. The revenue law of March 2, 1799, sections 18 and 92, prohibits free entry of *foreign* goods, and the first provision in the tariff act of July 24, 1897, requires that duties shall be laid on "all (specified) articles imported from *foreign* countries," as does the act of April 12, 1900, section 2, especially applicable to Porto Rico, while the military law in the Philippines would prevent the free entry of *such* goods. The law of nations would also prevent it. No such commercial liberty is known.

Cross vs. *Harrison*, 16 Howard, per Wayne, jus.

In construing the Constitution the *objects* of grants—and of requirements therein as well—must be kept in view. The objects of the uniform clause were to secure equality of taxation among the *States;* to ensure revenue beyond the power of the States to prevent that result, and to do away with the jealousies and friction that had existed among

the *States*. They surrendered taxing power and were accorded the benefits and protection of several tax provisions. Territory did not surrender the power to tax because it had none. It was not a party to the uniform agreement, and, in view of the absolute power to govern territory found in the Constitution and resulting from the right to acquire and from the power to regulate commerce, some clause should be found requiring Congress in taxing territory to observe the uniform clause or some prohibition found against taxing products coming in from ceded possessions. So far as *foreign* products coming into Porto Rico are concerned, the "uniform" provisiom has not been violated.

A *State* may not tax the products coming into it from another *State* unless it equally taxes its own (8 Wallace, 123). Nor tax the right of *citizens* of the States to freely pass and repass between the States. (*Crandell* vs. *Nevada*, 6 Wallace, 35.)

Nor may a *State* impose a license tax on an importer of *foreign* goods (*Brown* vs. *Maryland*, 12 Wheaton, 419). Nor may *States* impose taxes in the nature of regulations of commerce. The pending cases do not fall within either of these. Here we have an exercise of power *by Congress* taxing products for its own benefit from a ceded possession, and we insist that that right exists, either under the power to regulate commerce or in virtue of the sovereign power over or the right to make all *needful* rules, &c., for territory.

These cases are original. The question is, May *Congress*, under any of its powers over territory, lay the tax complained of? The cases do no more than approach the real one to be decided.

For instance, in *Almy* vs. *California*, 24 How., 169, the question was whether a tax laid by a *State* on bills of lading on gold and silver going from any point within to any point without the State was constitutional. Held not, because it was in effect *a duty on exports*, which, of course, is prohibited. This case is alluded to in *Woodruff* vs. *Parham*, 8 Wallace, 123, where Mr. Justice Miller says the mind of the court—in arriving at *the ground* for its conclusion in the Almy case—was evidently on *foreign* commerce; that the case, however, was well decided on the ground (however) that it was an attempt by a *State* "to regulate commerce," and that it was a tax by a *State* on goods going from one State to another in conflict with the freedom of transit of goods and *persons* between *States* and thus within the rule laid down in *Crandall* vs. *Nevada*, 6 Wallace, 35.

We wish right here to call especial attention to the fact that in *Crandall* vs. *Nevada* Mr. Justice Miller placed the decision on *special* grounds relating to *persons*, which may very readily have no bearing on *goods* going from State to State. That ground was that citizens have the right to freely pass and repass. Again that was a case of a *State* imposing a tax. Mr. Justice Clifford agreed in the conclusion reached by Mr. Justice Miller in the Woodruff-Parham case, but said the ground should have been that *Congress* (*i. e.*, not a State) had the exclusive power "to regulate commerce" among the States, and he added that he had strong doubts whether even *Congress* possessed the power to levy any such tax, *i. e.*, on products going from *State* to *State*.

That is the nearest approach that we are aware of to any decision of the pending question, but this court is well aware of the latitude of the power decided to be possessed by *Congress* to regulate commerce. It is nearly absolute. Here the question is as to the power by Con-

gress to regulate commerce between ceded possessions and the United States, where *for many reasons* there should be no limit on that power.

In *Woodruff* vs. *Parham*, 8 Wallace, *supra*, the court, after citing the tax clause in the Constitution (sec. 8, Article I), says:

> "Is the word 'impost' here used intended to confer upon Congress a distinct power to levy a tax upon all goods and merchandise carried from one *State* to another? Or is the power limited to duties on *foreign* imports? If the former be intended, then the power conferred is rendered nugatory by the subsequent clause of the 9th section, which declares that no tax shall be levied on articles exported from any *State*, for no article can be imported from one State into another which is not at the same time exported from the former. But if we give the word 'imports' as used in the first clause the definition of Chief Justice Marshall, and to the word 'export' the corresponding idea, something carried out of the United States, we have in the power to lay duties on imports *from abroad* and the prohibition to lay such duties on exports *to other countries*, the power *and the limitations* concerning 'imposts.'"

What obligation or necessity; what principle requires that the "uniform" requirement should extend to our ceded territory? The conditions between it and those between the States are dissimilar, the burdens would be onerous, leading to discontent and possible revolution. It was the *conditions* that induced Congress to refrain from placing our burdensome internal revenue taxes over Porto Rico. Was it *bound* to extend those laws over that island? Either so or the whole burden must fall on the taxpayers of the States!

General MacArthur, after speaking of the establishment of a republican form of government in the Philippines, says:

> "In the light of existing conditions it is difficult to realize that there is any possibility of such a future for the islands, especially as at present and for many years to come the necessity of a large American military and naval force is too apparent to admit of discussion."

Somewhere the *political* or discretionary power of Congress commences. Neither Congress nor the Executive branch of the Government has yet recognized our recent cessions of territory as a part of the United States *for fiscal or revenue purposes*. Is not the court bound by that? Does it not fall within the *principle* stated in *Williams* vs. *Suffolk Co. Ins. Co.*, 13 Peters, 415?

As the *impost* clause does not apply to these cases, which do not concern *foreign* goods, but goods entering the United States from (unorganized) territory but recently acquired, it will probably be said that the power to levy *taxes* requires that they also be uniform, but so far as *foreign* products coming into Porto Rico are concerned, they come in on the same basis as they do into the United States by sec. 2 of the Act of April 12, 1900. And such would be the result if it were not specially provided. (16 Howard, 164.)

II.

If we are right on our first proposition, that the "uniform" requirement applies—as to imposts and exports, only to *foreign* goods, then the contendents must resort to the other tax phrases in section 8 and

not only show the applicability thereof to ceded territory, but in order to get the advantage of them it must follow that the Constitution *ex-proprio-vigore* extends over ceded (unorganized) territory from the moment of cession.

There is another provision—aside from the "uniform" provision on which the contendents may chance to rely, to wit—paragraph 5 of sec. 9 of Article I, absolutely *prohibits* Congress from laying not only any tax on articles from a State going to a *foreign* country but forbids a "preference" being given by any regulation of commerce or revenue to the ports of one *State* over the ports of another State, nor shall *vessels* bound to or from one *State* be obliged to enter, clear or pay duties in another State.

The first provision was intended to apply to *foreign* commerce; it applies to ports in *States* in so many words.

18 Howard, 421, per McLean, Justice, and Nelson also *Gibbons* vs. *Wheaton*, 9 Wheaton, pr. Marshall.

The second provision of the paragraph prohibits duty (tonnage) on *vessels*—not on *products* in vessels, and hence is not applicable to these cases.

In 18 Howard supra Justice McLean says that the "preference" clause—"can have *no relation* to duties and imposts because in the 8th section it is declared that *they* shall be *uniform* (on *foreign* products supra) throughout the United States. The clause must refer to *some other* regulation."

See 102 U. S., 541.

Again, as to the "preference" clause, there must have been some one in the court below complaining of a violation of it. Nor are the contendents here—importers of goods from ceded possessions, in a position to complain because there is no pretense but what goods from the ceded territory come into every port of the United States on an equal footing, in so far as that there is no federal discrimination made between the ports of *States*. Like and similar *products* in one vessel from the ceded islands pay no more in the ports of one State than like and similar products therefrom do in the ports of another State. What was aimed at was equality between the ports of *States*.

It may or may not be *policy* to extend the uniform provision and those in sec. 9 to ceded territory; it may be "needful" or wise to do so, depending upon *conditions* and circumstances, but there is no *obligation*. Like the power to impose *direct* taxes, the power exists to extend, but its exercise is not mandatory, but discretionary.

The "preference" clause originally was introduced in the constitutional convention by Maryland, the idea being that without such a provision it would be in the power of Congress—under its power "to regulate commerce" to compel ships sailing in or out of the Chesapeake Bay to enter or clear at Norfolk or some other Virginia port, which would injure the commerce of Maryland. Some of the delegates *also* feared that under the same power Congress might favor ports of particular States by requiring vessels destined to *other* States to enter and clear at the ports of the favored ones, such as requiring a vessel bound for Baltimore to enter and clear at Norfolk.

The original draft was clumsily drawn and gave way finally to the clause as it now stands. 1 Elliott's Debates, 266, 270, 279, 280, 311, 375; 5 ib., 478, 483, 502, 545. Reference is made to it in *Penn.* vs. *Wheeling Bridge Co.*, 18 Howard, Rep., where the court says—"The

power to establish their ports of entry and clearance by the *States* was given up and left to Congress. But the rights of the *States* were secured by *the exemption* of *vessels* from the necessity of entering or paying duties in the ports of any *State* other than that *to which they were bound*, or to obtain a clearance from any port other than that at the home port or that from which they sailed; *and* also by the provision that *no preference* should be given by any regulation of commerce or revenue to the ports of one *State* over those of another." So far as the regulation of *revenue* (in the preference clause) is concerned, the prohibition in the clause *does not seem to have been very important, because in a previous section* (8) *it is declared that*—"all duties, imposts and excises shall be uniform."

That is, uniform throughout the *States* or United States.

III.

We seriously doubt whether these cases fall under the taxing clause (sec. 8) of the Constitution. That clause is a grant of power to raise revenue for certain *national* purposes. The tax raised from Porto Rican products has been and continues to be turned back to Porto Rico.

Sec. 4, act approved April 12, 1900.

We submit that the tax is imposed under the general (sovereign) power in Congress to govern territory and its power to make all "needful" rules and regulations, which is political and discretionary, and under its power to regulate commerce. We do not consider that the "uniform" requirement applies to ceded territory.

"STATES" AND "UNITED STATES."

The words "United States" in the "uniform" clause as to imposts, *i. e.*, duty on *foreign* articles, undoubtedly embrace the whole country; States, organized Territories, and possessions only ceded. Whenever the words "United States" are used in an international sense, in the sense that public writers use the word "State" or States; whenever the clause refers to *foreign* goods, affects foreign nations and not solely *domestic* affairs. As the words "United States" are generally used in the Constitution the words are given a construction that comprises *the entire country*—our entire domain, otherwise the term refers to the *States* only.

133 U. S. Rep., pp. 268–9.

To meet the demands of public policy, consistency, and reciprocity the District of Columbia in the above case was regarded as embraced in the French treaty that employed the words "*States* of the Union." This is in perfect accord with *Cross* vs. *Harrison*, 16 Howard, although the idea was not presented in that light, nor were duties there collected held lawful because of the *Constitution* extending over California.

The fact is that the words *States*, United States, and Union of States—used interchangeably in the Constitution, and as almost invariably used therein, exclude acquired territory that simply *belongs to* the United States.

1 Wheaton, 91–2 Cranch, 445.

In the opinion of Justice Curtis in *Scott* vs. *Sandford* (19 Howard, 616):

> "A practical construction, nearly contemporaneous with the adoption of the Constitution and continued by repeated instances

through a long series of years, may always influence and in *doubtful cases should determine the judicial mind on a question of the interpretation of the Constitution.*"

In support of this proposition Mr. Justice Curtis cites numerous decisions of the Supreme Court of the United States.

In view of this universally recognized rule, what did the men who made and the people who adopted the Constitution do and say prior to, at the time, and subsequent to the adoption of that instrument, with respect to the area to be included in the term "the United States?"

Between the time of the first meeting of the Continental Congress and the Declaration of Independence the term "United Colonies" was used and had come into general use. The first time that this term was used in any official document or declaration was June 7, 1775, Journal of Continental Congress, volume 1, edition of 1777, page 114.

The first time that these colonies are referred to in the proceedings of the Continental Congress by the term "States" was on June 10, 1776, when it was resolved that a committee be appointed to prepare a declaration "that the United Colonies are, and of right ought to be, free and independent States." And the first time in the history of our Government that the term "United States" was used in any official declaration or document was in the last paragraph of the Declaration of Independence: "We, therefore, the representatives of the United States of America," etc. The same Congress that made this declaration, on the 11th of June, 1776, by resolution, appointed a committee to prepare articles for a confederation to be entered into between the "Colonies." The report of this committee was debated from time to time until the 15th of November, 1777, when the Articles of Confederation were finally agreed to. Congress at the same time directed that these Articles of Confederation should be proposed to the legislatures of the *States*. And Territories? No; to the legislatures of the "States."

The first article reported by this committee and adopted by the Congress is as follows:

The style of this Confederation shall be "the United States of America."

In submitting these articles to the legislatures of the several States that came to form the Union or "the United States" Congress declared, among other things:

> "Whereas the delegates of the United States of America in Congress assembled did * * * agree to certain articles of confederation and perpetual union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, in the words following, viz."

Then, to make definite and certain what *area* should constitute "the United States," the preamble to the Articles of Confederation recites as follows:

> "Articles of Confederation and perpetual union between the States of New Hampshire specifically naming the thirteen States whose independence was declared on the 4th of July, 1776."

At this time "the United States" mentioned in the Declaration of Independence, in the preamble to the Articles of Confederation, in the

first article of the Articles of Confederation which gave the Government its name and style, and in the declaration which accompanied the articles to the several State legislatures DID NOT OWN A FOOT OF TERRITORY IN COMMON.

By paragraph 4 of section 1 of article 2 of the Constitution, relating to electors to elect a President, it is provided that Congress may determine the time of choosing the electors and fix the day for them to vote—"which shall be the same throughout the *United States*." As there are no electors from territory, the words "United States" are clearly limited to the *States*.

Again, section 1 of article 3 declares that the judicial power *of the* "*United States*" shall extend to all cases, &c.

The words "United States" in this clause can not possibly comprehend ceded territory, because the judicial power of the United States is not over nor can it extend to nor comprehend *territory* until Congress places it there. That has been held over and over again.

Am. Ins. Co. vs. *Canter*, 1 Peters, 511.
McAllister vs. *United States*, 141 U. S., 174.
Benner vs. *Porter*, 9 Howard, 242.

By the 13th amendment slavery is not only expressly prohibited in the "United States" but in "any place subject to *their* jurisdiction." The use of the plural pronoun shows that the words "United States" comprehend the States united that form the Union.

And again the only places subject to the jurisdiction of the United States are the District of Columbia, our dockyards, arsenals, forts, and public buildings, and territory *belonging to* the United States. If these were embraced in the words "United States," the words *and* in "any place subject to the jurisdiction of the United States" would be superfluous.

Section 4 of article 4 requires that the United States shall guarantee to every State a republican form of government, etc. That does not impose any obligation on the people in acquired possessions. They have no vote to aid an enforcement of that guarantee by Congress, and hence in the very nature of things, the obligation being limited to the representatives from the *States*, the words "United States" must mean the *States*.

Take section 2 of article 4—"The citizens of each *State* shall be entitled to all the privileges and immunities of citizens in the several States." Does that embrace ceded territory? Are the people in ceded (unorganized) territory, immediately upon cession and prior to the extension of our laws, etc., over such territory, entitled to *all* the privileges and immunities of the citizens of the several *States*? Clearly not. If they were there would be a contracted necessity for an organic law, except to carry the machinery to enforce what was already there. On the contrary, the uniform practice of the Government has been to legislate for territory.

The charter of the Bank of the United States in 1791 permitted its officers to establish branches "within the *United States*." They desired to locate one in Louisiana after its acquisition, but they did not think they had the power, and Congress was agreed. (See special act of March 23, 1804.) The first internal-revenue tax on spirits distilled in the United States, and which became a law on the 3d of March, 1791, directed "that the United States shall be divided into fourteen dis-

tricts, each consisting of *one State*." No attention was paid to the territory of the United States, although it was becoming populated and large towns existed in some portions. So, too, the original law for the collection of customs duties, of April 31, 1789, divided the States into districts, but did not extend over the Territories.

It is only when used in treaties or employed by writers on public law, in connection with matters affecting *foreign* nations, such as duties on *foreign* products, that the word "State" or "United States" or "States of the Union" have a wider signification. They may then well embrace our whole demain—

133 U. S. Rep., pp. 268–9. 1 Wheaton, 91. 2 Cranch, 445. *Fleming* vs. *Page*, 9 Howard.

In *Loughborough* vs. *Blake*, 5 Wheaton, 317, the Chief Justice was dealing with a direct tax laid on the District of Columbia, and there was no occasion to attempt to define "United States," although his definition, applied to *customs* revenue, was proper. He failed to note the discrimination made by Mr. Justice Field and noted by writers, and it must give way to the rule and the more mature definition in the cases cited where the significance of similar words were directly under consideration. If we were to criticize the language employed in the Loughborough-Blake case, and we do not deem it necessary, we would suggest that had the learned Chief Justice said in the beginning of the opinion, as he did in the latter part of it, that under the power of exercising "exclusive legislation in all cases whatsoever within this District" Congress had, within the District, all the power that it had in any State, and in addition the power of the legislature of a State, and therefore had an unqualified power of taxation, without regard to representation by the District in Congress, and that in case that power was exercised, the Constitution furnished a rule or standard by which the share of the burden might be justly and equally determined and applied, that would have ended the matter, and the decision would have been what it was—no more and no less.

Chief Justice Marshall in 5 Wheaton, 317, simply argued that as to *indirect* taxes (*i. e.*, *foreign* trade) the words "United States" comprehend our entire domain. We do not deny it, but only when they are used as we have indicated. He then said that as to *direct* taxes the words "United States" in section 8 of article 1, because of section 2, comprehended only the "States." And while *both* classes of taxes are in the taxing clause and *both* are required to be "uniform throughout the United States," the uniformity provision can be ignored, as to territory, by Congress; that no *obligation* rests on Congress to place *direct* taxes on territory. We agree as to that, but *also* because Congress may tax ceded territory or not, as it pleases, under its sovereign power, or its power to make all needful rules, or to regulate commerce, or because of either, or all. As to the plea of "necessity" advanced by the Chief Justice to support his conclusion, it was one of *expediency* and not a legal reason. Hence, probably, if the necessity either do not exist or should disappear the *necessity* for the application of the reason in support of the necessity would also disappear. If his mind was on *foreign* commerce when defining "United States," a necessity did exist.

Again, where is the "necessity" which he speaks of found in the Constitution for imposing the same proportionate rates of *indirect*

taxation on the products from ceded territory that we impose on *foreign* goods? It may well be that in a given case the *conditions* are so unlike in States and in acquired territory that a "uniform" rate on *domestic* traffic would be ruinous to people in the territory acquired. Take the case of Porto Rico. Gov. General Davis, March 31, 1900, said:

> "If Congress should adopt *free trade* the receipts of our custom-houses would naturally cease. One million five hundred thousand dollars have been collected during the fiscal year, and with free trade this will fall off. *What, then, will run the island?* * * * If free trade is adopted, I can not see how the necessary funds for conducting the affairs of the island are to be raised by myself or those who succeed me. Two million dollars are the present expenses, and this amount will be needed annually. There is only a small revenue incoming from stamps, liquors, tobacco, and mercantile licenses, and it is impossible to collect taxes because of the conditions."

And if we had added to these conditions the imposition of our onerous rates of internal-revenue taxation, what must have resulted! Because the United States happens to be forced at any time to take a cession of territory—by way of indemnity or otherwise—inhabited by a semicivilized people and hampered by conditions quite dissimilar with our own, is Congress bound to force impossible or hazardous financial burdens upon such territory? No, say the contendents, the "*obligation*" to impose *direct* taxes does not run to inhabitants of ceded territory, on the authority of Loughborough *vs.* Blake. But that theory was based on the ground that while the power existed, the obligation did not, but that in turn was based upon the ground that "States" in section 2 did not comprehend territory. No more do the words "*United* States," or States united, or union of States, except as against foreign nations, and, of course, *foreign* goods.

IV.

THE CONSTITUTION EX PROPRIO VIGORE, ETC.

If we are correct in these positions, that the taxing clause has no application for any one of the reasons above stated, even the contention that the Constitution extends *ex proprio vigore* and *eo instanter* over territory upon its cession, would not avail the contendents. The power to tax admittedly exists and contendents therefore must show some *prohibition* in the Constitution against that power as exercised and complained of. None exists. It is an inference only, drawn from the spirit of the Constitution or clauses that were intended, in return for a surrender of the taxing power to secure equality of burden among and to protect *States*, prevent friction and secure revenue to the Federal Government, and to prevent one *State* taxing the domestic products of another, which even they may do, if the tax *also runs* to the products of the State that taxes (8 Wallace, 123).

Did the *Constitution* extend itself over the territory acquired from Spain immediately upon cession? If it did not, that we take it is the end of these cases because the power in Congress to lay taxes in territory is almost necessarily included in its sovereign, or its constitutional

power to govern or make all needful rules, etc., for territory; like that to regulate commerce, complete in itself. The language of Chief Justice Marshall, in Gibbons *vs.* Ogden, 9 Wheaton, in speaking of the *commerce* clause, is equally applicable to any remedy that exists for taxation to the uttermost limit. He said:

> "The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse."

Nothing perhaps proves this better than the tax on State banks and the nonintercourse or embargo acts, that closed the one and brought ruin and disaster in the other.

"A presumption will never be indulged that Congress intended to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous." (12 Peters, 72, per Story.)

We also say that the power of Congress to tax imports from the (Spanish) ceded possessions must be shown to be nonexistent *beyond all doubt*, and the burden is on the contendents. Per Strong, 12 Wallace, Legal Tender Cases. (*Fletcher* vs. *Peck*, 6 Cranch, 87.)

The *ex proprio vigore* contention is not of recent birth. It was put forth in the case of Oregon Territory, in that of California, and also in the New Mexico-Texas embroglio. Considering *the reason* why the theory was put forth by Mr. Calhoun and some others in the case of Oregon and California, to wit, in order that the South might take slaves (property) into ceded territory, which, if the right had existed, would have been more or less valuable to individuals and of great assistance in preserving an equilibrium between the free and the slave States, and we can not perhaps express so much surprise at the vigor of the contention. There was excuse for it then, but none now that is not sordid. But even the contendents did not believe in the theory, because in the case of California the Walker amendment offered to the civil and diplomatic bill at that time contained an express provision legislating the Constitution and our revenue laws over California, which was a concession that they were not already there. (Cong. Globe, 30th, 2d, pp. 561, 585, 595.)

HOW TERRITORY IS GOVERNED.

The following propositions will, we think, be found well established:

1. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupancy until its fate shall be determined at the treaty of peace. If it be ceded by the treaty the acquisition is confirmed and the ceded territory becomes a part (geographically) of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such as its new master shall impose. On such transfer the relations of the inhabitants with each other undergo no change. Their relations with their former sovereign are dissolved and new relations are created between them and the government which has acquired their territory. The same act which transferred their country transferred the allegiance of those who remained in it, and the law which may be denominated

political is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the state. All the laws which were in force in the islands ceded by Spain while a province of Spain—those excepted which were political in their character—which concerned the relations between the people and their sovereign, remained in force until altered by the Government of the United States.

Am. Ins. Co. vs. *Canter*, 1 Peters 511, and 9 Peters, pp. 733–748.

Until the territory is ceded by the treaty of peace, it is considered that the holding of such territory is a mere military occupation. When the acquisition is complete, by cession, the laws which were in force while the territory was a part of another nation—those excepted which are political in their character, as, for instance, those attaching to the obligations of allegiance and protection—remain in force until Congress acts. After complete acquisition, and until Congress acts to change them, the former local laws apply, and the President administers them through his agents.

This is the *general* principle, and yet in New Mexico the code promulgated by General Kearney as military conqueror and occupant remained in force long after the cession of that territory. And in California it was the *de facto* government.

Cross vs. *Harrison*, 16 How. Leitsdorfer case, 20 How., 177.

In the latter case it was held that in the absence of legislation *after* a conquest, cession and treaty, *where the latter is silent*, the laws, orders, or decrees of the *de facto* provisional government promulgated by the military power continue. In the latter case, *supra*, a provision relating to attachments, found in the Kearney military or provisional government code, was held constitutional, and yet it was not until long after—September, 1850—that Congress gave New Mexico an organic law.

This was in line with what was said and done in the cessions of Louisiana and Florida, and with the view expressed not only by Mr. Nicholson of Maryland in the case of Louisiana, but it agrees with the idea expressed by Gouverneur Morris. Mr. Nicholson said of Louisiana: "It is territory purchased by the United States in their confederate capacity, and may be disposed of by them at pleasure. It is *in the nature of a colony whose commerce may be regulated without any reference to the Constitution.*"

Mr. Morris, who was the author of the "needful" rules and regulations provision in the Constitution (sec. 3, article 4), said of it:

> "I always thought, when we should acquire Canada and Louisiana, it would be proper to govern them as *provinces* and allow them no voice in our councils. In wording the third section of the fourth article I went as far as circumstances would permit *to establish the exclusion.*" (3 Morr. Wr., page 192.)

In the case of *Sere* vs. *Petot*, reported in 6 Cranch, the court said:

> "The power of governing and legislating for *a* Territory is the inevitable consequence of the right to acquire and hold territory. Could this position be contested, the Constitution of the United States declares that 'Congress shall have power to make all needful rules and regulations respecting the territory of the United States."

Mr. Justice Bradley, in 136 U. S., said:

"The power of Congress over the Territories of the United States is general and plenary, *arising from and incidental to the right to acquire* the territory itself *and from* the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory and no power to govern it when acquired. The power to acquire territory * * * is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of *national sovereignty*, and belong to all independent governments."

As to the *limitation* on the power to govern, Chief Justice Marshall said in the Canter case:

"If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power? To this I answer, that in common with all other legislative powers of Congress it finds limits in the express *prohibitions* on Congress *not to do* certain things; that in the exercise of the legislative power Congress can not pass an ex post facto law or bill of attainder, and so in respect to each of the other prohibitions contained in the Constitution."

But the fact that Congress is thus bound in no wise suggests that the Constitution is *already over* the territory about to be legislated for. And Mr. Justice Brown, in *Holden* vs. *Hardy* (169 U. S., 366), says:

"In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the *civil law*. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system which represented the growth of generations of inhabitants a jurisprudence with which they had no previous acquaintance or sympathy."

In perfect accord with all this is what the late Mr. Justice Miller, a profound interpreter of the Constitution, said in 118 U. S., 375–380:

"This power of Congress to organize territorial governments and make laws for their inhabitants arises *not so much from the clause in the Constitution* in regard to disposing of and making rules and regulations concerning the territory and other property of the United States as from the ownership of the country in which the territories are and the right of exclusive *sovereignty*, which must exist in the National Government and can be found nowhere else."

In *Ams. Ins. Co.* vs. *Canter*, Chief Justice Marshall said, speaking of territorial courts created by Congress:

"They are legislative courts, created in virtue of the general right of *sovereignty* which exists in the government or in virtue of

that clause which enables Congress to make all needful rules and regulations respecting the territory *belonging to* the United States."

Justice Bradley, in 12 Wallace, pages 554, 555, 556, says:

"The Constitution of the United States established a government, and not a league, compact, or partnership. It was constituted by the people. It is called a government. In the eighth section of Article I it is declared that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof. As a government it was invested with all the attributes of *sovereignty*."

Prof. Hart pertinently remarks:

"The important thing about *colonies* is the coexistence of two kinds of government, with an ultimate control in one geographical region and dependence in the other. Since 1784 there has never been a year when in the United States there have not been, side by side, such a ruling nation and such subject colonies only we choose to *call them* 'Territories.'"

The California matter in Congress led to a very careful consideration of the power to govern ceded territory—not *a* Territory, but unorganized territory—and the views of unprejudiced men at that time are worthy of careful study.

On that occasion Senator Berrien, of Georgia, a very profound lawyer and statesman, said, February 26, 1849:

"If I were not averse to employ the language of paradox, I would say that those who occupy the opposite sides of this proposition are both right and both wrong—that the Constitution does and does not extend to the territories. 'It *is certainly true*, as was said by the Senator from Massachusetts, that it does *not* operate in the territories *proprioviqore*, as a whole, in its totality; * * * as a totality *it cannot operate by its own force* in the Territories of the United States. The great object of the Constitution was the formation of a system of government; and so far as its provisions relate to that object, they do *not* extend to the territories of the United States. "That object we seek to accomplish, when under the authority of the Constitution, we are about to *organize* a government for these territories.

"But it was not the *sole* object of the Constitution to ordain and establish a government for the thirteen States, by whose delegates the Constitution was formed. It was *also* intended to establish certain great *principles* by which that Government was to be regulated. It contained moreover, and especially in the amendments, certain *principles* of public liberty, certain safeguards of individual rights which *are capable of being extended* to the Territories of the United States. When, therefore, it is said that the Constitution does *not* so extend, the answer is yes, that is true; *as a whole* it does *not* operate there, and when, on the other hand, it is said that the Constitution does extend to the Territories, the answer is, yes, that also is true; there are *portions* of it which do and of necessity must operate in the Territories of the United States. By *what authority* are we about to organize a government over those

Territories; we are told that it is under the provision of the Constitution which gives us power to make 'all needful rules and regulations' for the government of the territory or other property of the United States. Now *I doubt whether that is the true source of our authority.*

"I think it *too limited!* I think the object of these rules and regulations is clearly indicated by the expressions 'to dispose of' and make rules respecting 'the territory or *other property* of the United States.' The Territories therein are obviously considered as *property* and not as the habitations of freemen whose municipal regulations are to be prescribed by Congress or adopted by themselves. But I do find a power, derived from the Constitution, to organize a government for the Territories, which *though not expressed*, is still as distinct as though given in terms. Since by the Constitution we have power to do that which must or may result in the *acquisition* of territory, we must also have power to do *whatever is required* to be done for *the government* of such territory. * * * Then whether it results from the clause referred to, or whether it is deduced as an incident from the war or treaty making power, it is still a power derived from the Constitution. * * * I will vote for the Walker amendment (which was to extend the Constitution over California) if he will accept an amendment which shall limit the enactment by which the Constitution is to be extended to these Territories (they were not yet Territories—only territory) to *such of its provisions as can be applied* to *the conditions* of *a* Territory of the United States."

Can be applied by whom? Clearly by Congress.

In his letter to the President of February 23, 1791, Mr. Hamilton said:

"It will not be doubted that if the United States should make a conquest of any of the territories of its neighbors, they would possess *sovereign* jurisdiction over the conquered territory.

"This would be rather the *result* from the *whole mass* of the powers of the Government and from the nature of the political society than as a *consequence* of either of the powers specially enumerated. * * * The jurisdiction acquired over such conquered country would certainly be competent *to any species of legislation.*"

Mr. Hamilton probably meant any legislation compatible with the prohibitions, and regard being had for life, liberty, religion, and property.

In the first session of the Thirty-first Congress Mr. Clay said:

"I take it for granted that what I have said will satisfy the Senate of that first truth—that slavery does *not* exist in the acquired territory by law, *unless* slavery was carried there the moment the treaty was ratified by the two parties to the treaty, under the operation of *the Constitution* of the United States. Now, really, I must say that the idea that *eo instanti* upon the consummation of the treaty the Constitution of the United States spread itself over the acquired territory and carried along with it the institution of slavery is *so irreconcilable* with any comprehension of any reason which I possess that I hardly know how to meet it."

Congressional Globe 1st, 31st, Appendix 117.

Mr. Alex. H. Stephens, of Georgia—a profound statesman and constitutional lawyer, did not claim in the debate in 1850 that the South had a right by virtue of *the Constitution* to carry slaves into the territory acquired from Mexico. He contented himself with insisting that "under our Constitution the power of making *regulations* for the enjoyment of the public domain devolved upon Congress, *the common agent* of all the parties interested in it, and that in the execution of that *trust* it became *the duty* of Congress to pass all laws necessary or needful for an equal and just participation in it."

Appendix Cong. Globe, 31st, 1st, p. 1084.

The views of Mr. Webster are quite familiar to this court. In a colloquy with Mr. Calhoun over California in the second session Thirtieth Congress Mr. Calhoun said: "The honorable gentleman from Massachusetts says that the Territories (California) are not *a part* of the United States—are not of the United States. I had supposed that all the Territories were *a part* of the United States. They are called so."

Mr. Webster: "Never."

Mr. Calhoun: "At all events they *belong* to the United States."

Mr. Webster: "*That is another thing.* The colonies of England *belong* to England, but they are not *a part* of England."

See Cong. Globe, 30th, 2d, Appendix, p. 274.

Mr. Webster's language is that used in the "needful" rule and regulation provision, sec. 3 of article 4, and it is the idea so happily expressed by Mr. Justice Gray of this court in *Elk* vs. *Wilkins*, 112 U. S., pp. 101–102, where he speaks of Indians being born *in* the "United States," but only in a *geographical* sense.

Mr. Thaddeus Stevens said—1st session 31st Congress:

> "The Supreme Court has fortified its opinion of the power of Congress over the 'Territories' as a necessary *consequence* of the right to acquire by treaty. If I were allowed to indulge my own judgment, I should place the right of Congress to legislate for the territory acquired from foreign nations *wholly* in *the consequences* resulting from the right of acquisition."
>
> Cong. Globe Appendix, 764, 30th, 1st.

Something may be said to the effect that this Government may not acquire territory to be held and governed as *colonies*, and Mr. Justice Taney's remark may be cited to that effect. If we were to discuss that from its broadest aspect it could only come to what Pomeroy says of it, p. 406:

> "The declaration that the United States may acquire territory to be formed into States, but not to be indefinitely held as colonies, is a proposition clearly *without any practical value;* it is a rule which can not by any possibility be enforced. Territory may be acquired and must be governed by Congress. How long it shall remain in its condition of dependence, or when it shall be erected into a State, is a matter to be determined exclusively by the national legislature. Congress can not be compelled to act; nor can the Territories be clothed with the attributes of States without the action of Congress. 'New States may be admitted by the Congress into this Union.' This language is simply permissive. When the admission shall be effected, and how long it shall be delayed, are matters residing entirely within the Congressional discretion."

And yet the Chief Justice in 19 How., 446, felt constrained to admit that it is in the discretion of Congress to hold terrritory "until it is in a suitable condition to become a State," and that "it is a question for the *political* department of the Government, not the judicial; and whatever the political department of the Government *shall recognize as within the limits* of the United States the judicial department is also bound to recognize, and to administer in it the laws of the United States."

Chief Justice Taney also said:

> "The *form* of government to be established necessarily rested in the discretion of Congress. It was their duty to establish the one *that would be best suited for the protection* and security of *the citizens of the United States*, and other inhabitants who might be authorized to take up their abode there, and that must always depend upon the exisiting condition of the territory, as to the number and character of its inhabitants and their situation in the territory."

New Mexico was held out over half a century. Alaska is liable to be kept out much longer. If all our territory is acquired to become States, especially the Philippines, it may not be long before the downfall of the Republic will be sounded.

The Articles of Confederation, sec. 11, looked to the protection of the original Union of 13 *States* from the *admission* of new States as an apprehended dangerous policy. Hence it was provided that—

> "Canada acceding to this Confederation and joining in the measures of the United States *shall* be admitted into and entitled to all the advantages of this Union, *but no other* colony shall be *admitted* into the same unless such admission be agreed to by *nine* States."

From this it is readily implied that under the Confederation even there was understood to be power to *acquire*, not only Canada, but *other* colonies, the restriction or limitation being on the *admission* thereof as *States*. But *how* was the colony, province, acquired territory or district to be *governed* provided the consent of nine States to the admission thereof as States could not be obtained? There was no provision for *a* "territory" under the Articles of Confederation, nor for the government of acquired territory; no *general* power to admit new States, no grant of power to Congress to make all needful rules and regulations for territorial domain nor for territories. How, then, was such territory to be held and governed except under the implied power to govern that is incident to the power to acquire? It was a *casus omissus* so far as any *express grant* of power was concerned. There was no authority unless the Confederation had sovereign power over the matter.

In dividing Louisiana it was called a "*province*" (2 Stat. at Large, 287, sec. 12), and in organizing it it was called the "district" of Louisiana, and it was not created *a* "territory" until 1805. Ib., p. 331.

In the earlier days of the Republic it was the practice to extend to inhabitants in acquired territory rights and privileges, but in moderation reaching through *two* grades of territorial government, the first being almost despotic, as in the case of "Orleans," Louisiana and Florida territories.

DIFFERENCE IN TREATIES.

The treaties with France, Mexico, and Spain, for the cessions heretofore acquired from them, all substantially provided:

> "The inhabitants of the ceded territory *shall be incorporated in the Union* of the United States, and admitted *as soon as possible*, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

The Alaska treaty stipulated that—

> "The inhabitants, * * * with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion."

A part of the same joint resolution by which the Hawaiian Islands were annexed provided that they are—

> "Annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, * * * and *until legislation is enacted* extending the United States customs laws and regulations to them the existing customs regulations of the Hawaiian Islands with the United States *shall remain unchanged?*"

On the other hand the recent treaty with Spain provides:

> "Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, * * * in case they remain in the territory (they) may preserve their allegiance to the Crown of Spain by making before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance, in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside. The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States *shall be determined by the Congress.*"

Before proceeding let us ask, Why was the verb ("shall be") in the future or potential tense used in the Louisiana and other treaties, if the territory was already by mere act of cession incorporated in the Union as *a part* of it in any other sense than *geographically?* Why was the promise extended that as soon as possible the inhabitants should enjoy all the rights and privileges of citizens of the United States if *the cession* guaranteed the same *eo instanti?*

In the case of "Louisiana," notwithstanding the moral obligation in the treaty, no grant of rights and privileges is found in the act of October 31, 1803. By that act Congress authorized the President to take possession of that province (ceded April 30, 1803) and to use the Army and Navy to maintain our authority, and until the expiration of the (then) present session of Congress—unless provision for the *tem-*

porary government was sooner made by Congress, all the civil, military, and judicial powers exercised by the officers of the then existing government were vested in such persons as the President might designate, in order—to do what? Simply to protect the inhabitants therein in the free enjoyment of their liberty, property, and religion.

2 Stat. at Large, 245.

This clause was likewise in the Florida "occupation" act of March 3, 1819, extended by act of March 3, 1821, and under that clause Florida was governed despotically until March 30, 1822.

See 3 Stat. at Large, 637–753, sec. 11.

The President appointed Claiborne governor of Louisiana October 31, 1803, with all the powers and duties theretofore exercised and held by the Spanish governor-general and intendant of the province, and December 20 of that year Claiborne proclaimed that "all laws and municipal regulations which were in existence at the cessation of the late government should remain in full force."

In the case of Florida, March 10, 1821, President Monroe appointed Major-General Andrew Jackson governor, with all the powers and duties theretofore held and exercised by the captain-general, intendant and governor under Spain. This was done under authority of the act of Congress of March 3, 1803, such power to continue until the end of the first session of the 17th Congress unless Congress sooner made provision for the *temporary* government of that province—for it was mere territory but not yet *a* "Territory" of the United States.

In organizing "Orleans" Territory in 1804, the act (sec. 12) provided that the balance of the "*province*" of Louisiana was to be known—as what? Not as *the* "Territory" of Louisiana, but as the "district" of Louisiana and the executive power that had—in 1803, been intrusted to the President was shifted to the governor of Indiana Territory! The judges thereof were to make all laws—"conducive to the good government of the inhabitants," and the then existing laws were to continue until modified or repealed by the governor and judges of Indiana Territory. Like power to repeal and modify laws was intrusted to the governor and judges in the "Northwestern Territory." (1 Stat. at Large, 285.)

In other cases—as in "Orleans" and "Florida," Congress entrusted almost absolute power to a governor and thirteen fit persons appointed by the President. (2 Stat. at Large, 203; 3 *ib.*, 750.) In the case of the "Northwest Territory" the power was conferred on a governor, a secretary of state, and three judges, all appointed by Congress.

It was not until 1800 that "Mississippi" Territory was advanced to *second* grade. Ohio Territory was advanced to that grade in 1798. Indiana took form and *first* grade in May, 1800, and second grade in 1805. Michigan took *first* grade in July, 1805, and Illinois in 1809. Practically, they were provinces or *colonies*.

Section 10 of the act of 1804, regarding Louisiana, *prohibited* the importation therein of foreign, *as well as domestic slaves* from the States, imported subsequent to May 1, 1798, and as to others the owners could only take them with *bona fide* intent to settle therein.

If the Constitution extended itself *eo-instanti* over acquired territory, whence came the right to exercise that power; slaves being property they could—under the Constitution under the contention now

put forth, have been carried into Louisiana, any mere act of Congress to the contrary notwithstanding.

The fathers do not appear to have understood this matter as Mr. Calhoun felt called upon later to insist.

Our earlier history shows that in organizing "Mississippi Territory" power was given the President to establish it—"in all respects similar" to that creating the "Northwest Territory." (1 Stat. at Large, 549.)

In the act of February 3, 1809, organizing the Territory of "Illinois" a similar provision is found.

In organizing the Territories of "Indiana" and of "Michigan" by acts of May 7, 1800, and January 11, 1805, the same provision was inserted. It was provided that the inhabitants should be entitled to enjoy the right of trial by jury, bail, the privilege of the writ of habeas corpus, etc. Sometimes the provision to accomplish this was *general*, as in the case of "Illinois" Territory, and a like clause will be found in the cases of Indiana, Michigan, and Missouri Territories.

Take the case of Oregon, ceded to the United States in 1846, it averted war. Its provisional or dual form of government remained in operation, however, until March 3, 1849, when the people by an organic (territorial) law *were granted* the rights guaranteed the inhabitants of the Northwest Territory by the ordinance of 1787, and the laws of the United States—applicable thereto, were likewise by specific legislation, *extended* over the territory.

In the Dred Scott case Mr. Justice Campbell stated his views on the subject of the power to govern territory to this effect—that the power granted to make all needful rules and regulations respecting territory belonging to the United States is restricted to such administrative and conservative acts as are needful for the preservation of the public domain and its preparation for sale or disposition, such as land surveys, land titles, reservations for schools, preemption claims, laws for the protection of settlers. He added—"But this section (3) of article (4) *does not exhaust* the powers of Congress within the territorial subdivisions nor over the persons who inhabit them. Congress *may exercise there all the powers of government* which belong to them as the legislature of the United States, of which these territories make a part. Thus, the laws *for the taxation* of foreign, *federal*, and Indian commerce," etc. Again, "to mark the bounds of the jurisdiction of the Government of the United States within the territory and its power with respect to persons and things within the municipal subdivisions *it has created* is a work of delicacy and difficulty and in a great measure *is beyond the cognizance of the judiciary department* of the Government. *How much* municipal power may be exercised by the people of territory *before their admission* to the Union *the courts of justice can not decide.* This must depend for the most part on *political* considerations. I do not feel called upon to define the jurisdiction of Congress." (19 Howard, pp. 513–514.)

Mr. Justice Catron also denied that the word "territory" in section 3 of article 4 was limited in its meaning to *land* (19 Howard, p. 541). He stated that the word was also descriptive of a district of country; that it might mean land for the purpose of sale; or "territory" for the purposes of government; that it signified tracts of country outside the limits of the States, ib., 613. That power to make needful rules and regulations was power to *legislate*, ib., 614; that the only *limit* on the power was found in the *prohibitions*, ib. id. He said, "I can not doubt that it is a power to govern the inhabitants of the territory by

such laws *as Congress* deems *needful*, until they obtain admission as States," ib., p. 615. Observing the *prohibitions* we assume.

The three distinct political views at that time entertained as to the right of Congress to legislate in regard to slavery in territory are presented in 19 How., and Justice Curtis proceeded to argue that they were *political* considerations; *i. e.*, whether a prohibition on slavery would be a "needful" regulation is for Congress to determine. The clause, in other words, empowered Congress to make *all* "needful" regulations. Could the judiciary engraft an exception on the clause? Was Congress prohibited to legislate? The judge held not; *the judiciary might not interfere in a political* or discretionary legislative matter.

Mr. Justice Curtis further says, ib., p. 623, the majority of this court admit that "Congress has power to organize and govern the territories (organized) *until* they arrive at a suitable condition for admission to the Union; they admit also that the *kind* of government which shall exist therein *should* be regulated *by the condition and wants of each territory* and that it is necessarily committed to the *discretion* of Congress to enact *such* laws for that purpose as that discretion may dictate; and *no limit* to that discretion *has been shown, or even suggested*, save those positive *prohibitions* to legislate which are found in the Constitution."

In 9 Howard, 242, this court said:

> "Whether there are (*any*) provisions in the Constitution which extend to and act upon these Territorial governments (organized) it is not now material to determine."

Again—

> "The *admission* of the State (of Florida) brought the Territory under the full and complete operation of the Federal Constitution" p. (243).

The inference is that it is the *admission* that operates to bring a Territory fully under the operation of the Constitution, unless general legislation can extend it. It is one thing for Congress to be prohibited; quite another for inhabitants of acquired territory to have rights and *privileges* regardless of treaty or the judgment of Congress.

It seems to have been assumed by many that because ceded (unorganized) territory has been spoken of as "*a part*" of the United States, that it signifies not only the obliteration of the words "*belonging to*," as used in the Constitution, but that the inhabitants of such possessions have become entitled to *all* the rights and privileges guaranteed by the Constitution to the people of the States. Such territory cannot become a part of a *State;* no more can it become a part of *all* the States or United States except in a *geographical* sense. It is only when *admitted* as a State that territory becomes a part of *the union* of States; the 46th integer perhaps in the Union. Speaking of the conquest and occupation of Tampico, the court said:

> * * * "As regarded by *all other nations*, it was a part of the United States and belonged to them as exclusively as the territory included in our established boundaries; but yet it was *not a part of the Union*, for every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws."

Fleming vs. *Page*, 9 How., 603, 615.

This shows in what sense territory is *a part* of the United States, *i. e.*, a part of the national domain, as to *foreign* nations. That was the sense in which Mr. Justice Wayne used the words "a part of the United States" in 16 Howard. He said:

> "The ratification of the treaty made California a part of the United States, and as soon as it became so the Territory became subject to *the acts* which were in force to regulate *foreign* commerce with the United States."

As to *foreign* commerce, our revenue *laws* took effect, and of course they were "uniform" as to *such* commerce.

Mr. Berrien, of Georgia, said in the Senate:

> "As to the power of Congress, I have nothing to add to what I said the other day. Congress has full power over the subject. It may establish any such government and any such laws in the Territories as, in its discretion, it may see fit. It is subject, of course, to *the rules of justice and propriety*, but it is under no *constitutional* restraint."

Mr. Benton ridiculed the idea of the Constitution extending to the Territories as the doctrine of "the transmigration of the Constitution."

The statement that we first commenced with New Mexico to extend the Constitution, etc., over territory has been denied or criticized. It has been said that the act of 1822 giving Territorial government to Florida provided that—

> "No law shall be valid which is inconsistent with the Constitution and laws of the United States," etc.

And that the act of 1823 amendatory and supplementary thereto provided that the people therein—

> "Shall have legislative power over all rightful subjects of legislation; but no law shall be valid which is inconsistent with the Constitution and laws of the United States or which lays any person under restraint," etc.

That was simply a prohibition—not an *extension* of either the Constitution, nor of our laws to said Territory. The *prohibition* would have existed, so far as the Constitution was concerned, without that legislation, but it carried neither the Constitution nor the body of our laws over said Territory. In fact the act of March 30, 1822, extended certain *specific* acts only over said Territory not inconsistent with that act.

3 Stat. at Large, 523.

In fact no person can intelligently peruse the various laws relating to our ceded territory (see Senate Doc. 148, 56th, 1st) without concluding that Congress claimed and exercised absolute power, within the prohibitions of the Constitution, over ceded territory. But *prohibitions* are one thing and the extension of either the Constitution or our laws *eo-instanti* is quite a different matter.

The theory that the Constitution, *ex proprio vigore*, extends to territory the moment it becomes the property of the United States by cession or in any of the modes we may acquire it has from the foundation of the Government been denied by the treaty-making power of this, and so understood by other nations when dealing with us, by the

uniform practice of the Congress when making laws for the Territories. Spain and France and Mexico and Russia insisted on putting into the treaties of cession guaranties entirely unnecessary if our constitutional provisions extended to the ceded territory, and in legislating for the Territories why has the Congress of the United States repeatedly, for half a century, enacted provisions extending to such Territories, so far as applicable, the provisions of the Constitution of the United States as law for such Territories, if the Constitution of its own vigor had already extended itself to such domain?

This practice and this understanding ought to have very considerable weight.

Beginning with New Mexico in 1850 Congress, in giving territory organic law, has invariably extended thereto the Constitution and all laws applicable. Finally the following general law, which became section 1328 of the Revised Statutes, was enacted:

> "The Constitution and all the laws of the United States which are not locally inapplicable shall have the same force and effect within all the *organized* Territories and every Territory hereafter *organized* as elsewhere within the United States."

Not a word said about *un*organized territory. The deduction, from failure to extend either or both to such territory, is plain.

The fact is, as stated by Cooley on Constitution, page 36:

> "The Constitution was made for the *States*, not for the Territories. It confers power to govern the Territories, but in exercising this the United States is a *sovereign* dealing with dependent territory according as in its wisdom shall seem politic, wise, and just, having regard to *its own interests* as well as to those of the Territories."

GUARANTEES FOR PERSONAL RIGHTS.

Contendents may say, How are we to carry out our treaty stipulation guaranteeing protection to person and property unless the Constitution shall do it? One answer to that is, the Constitution could not render the guarantees effectual even if it extended over ceded territory. It requires law and machinery.

Whether the inhabitants of ceded territory, *before* being given an organic law based upon common-law principles, become *eo instanti* upon mere cession entitled to an enforcement of the guarantees in the Constitution and amendments respecting protection for life, liberty, property, and the exercise of their religion depends—

1. What the treaty of cession provides.
2. What their existing law secures them.
3. Whether a *de facto* provisional government has been promulgated by our authority.

We know of no civilized government which does not accord some measure of protection even under the civil law. *If it do not* in any given case of cession and *the treaty is silent* and no provisional government has been promulgated, then, pending action by Congress, we do not see but what the existing laws, *whatever they may be*, remain in force. That certainly was the conclusion reached in *American Ins. Co.* vs. *Canter*, supra, and by all writers on public law. It has so happened that in *all* our treaties for territory the guarantees men-

tioned have been embodied, and that signifies, perhaps, that the machinery was there to *enforce* the guarantees. In that event so much of the civil or other existing law as might deny those rights would give way to the provisions of the common law because of the treaty, or the letter or spirit of the provisional or *de facto* government based on common-law principles, which may have been established by the military.

Justice Wayne, in the case of *Cross* vs. *Harrison* (16 Howard, 164), said:

> "The termination of the war left an existing government—a government *de facto*—in full operation, and this will continue with the presumed consent of the people until Congress shall provide for them a Territorial government."

In the trouble over California, Sec. Buchanan said:

> "By the conclusion of the treaty of peace the military government was established over them under the laws of war, as recognized by the practice of all civilized nations. * * * The termination of the war left an existing government—a government *de facto*—in full operation, and this will continue with the presumed consent of the people until Congress shall provide for them a Territorial government. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest."

The *privilege* of writs similar to the habeas corpus took root in the Roman law. The *principles* thereof were insisted upon in one form or another many years before King John signed Magna Charta in 1215, and although severely contested if not overthrown or evaded at times, habeas corpus took its place in the common law of the land, and was finally placed in the statutes of England and is as stable there, where no *written* "Constitution" exists, as it is in the United States. It came or was chartered down to the American Colonies as a *common-law* right or privilege. The colonists demanded its recognition as such. It was resisted in some cases, enforced in others, and was finally extended by special acts to some or all of the colonies.

Church on Habeas Corpus, secs. 1, 5, 16, 19, 21, 38, 40 to 46.

In the case of Louisiana, however, notwithstanding the *treaty* provision of guarantee of protection, we find Mr. Webster, in the Senate in 1849, asking—

> "How did we govern Louisiana before it was a State? Did the writ of habeas corpus exist in Louisiana during its Territorial existence? Or the right to trial by jury? Who ever heard of trial by jury there before the law creating the Territorial government gave the right to trial by jury? No one."

The conditions in ceded territory would probably be as we have stated them, supra. *prior* to any legislation by Congress. When Congress commences to legislate it would be bound by all the *prohibitions* and

all the limitations in the Constitution. As Mr. Justice Bradley said in *Corporation of Latter Day Saints* vs. *United States*, 136 U. S.:

> "Doubtless Congress *in legislating* for the Territories would be subject to these fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments. *But these limitations would exist* rather *by inference and general spirit* of the Constitution, through which Congress derives all its powers, than by *any express and direct application of its provisions.*"

To the same effect Mr. Justice Matthews had said—

> "The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, *by the principles* of constitutional liberty, which restrain all the agencies of government, State and National."
>
> *Murphy* vs. *Ramsey*, 114 U. S.

The language of Justice Bradley, quoted from 136 U. S., was cited and reaffirmed by Justice Harlan in the case of *McAllister* vs. *United States* (141 U. S.).

There is nothing in the language used by Mr. Justice Harlan in 136 U. S. that conflicts with our contention. He was speaking of a trial for felony in an *organized* Territory by a jury of only eight persons, over which Territory the Constitution and our laws applicable *had been extended*. He very properly said—

> "Assuming, then, that the provisions of the Constitution relating to trials for crimes and criminal prosecutions apply to *the Territories* of the United States, the next inquiry is whether the jury referred to in the original Constitution and in the sixth amendment is a jury constituted as it was *at common law* of twelve persons, neither more nor less. * * * This question must be answered in the affirmative. When Magna Charta declared that no free man should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurists. Those who emigrated to this country from England *brought with them* this great privilege as their birthright and inheritance, as a part of that admirable common law, and which fenced around and interposed barriers on their side against the approaches of arbitrary power. * * * "

For *the same reason* this court properly decided the case of *Springville City* vs. *Thomas*, 166 U. S., where the Territorial law provided that unanimity in a verdict was not necessary. The Constitution and our laws had been extended over the Territory.

These are the facts. It was thought by some of the framers of the Constitution that a bill of rights should be incorporated, but as the Constitution was an instrument of enumerated powers, if it contained nothing empowering the Government to *deprive* any citizen of *his common-law rights*, there would be no need of inserting negative clauses; the failure to confer would leave all such power beyond constitutional authority. Mr. Hamilton argued, "Why declare that things shall not be done which there is no power to do? Why say that the liberty of the press shall not be restrained when no power is given by

which restrictions may be imposed?" And he proceeded to argue that insertions of prohibitory clauses against the invasion of fundamental or common law rights might give some men, disposed to usurp, a pretext at some time to argue that but for such *proposed* provisions in the Constitution the power to deny them to the individual would exist. Jefferson may have thought differently and over it there was more or less opposition to the Constitution as framed and it probably might not have been ratified but for a tacit understanding or agreement that "amendments" in regard to personal rights, founded in the common law, would be proposed and adopted as an assurance. The clauses in the Constitution itself, for the protection of persons and property, had reference mainly to the action of *State* governments and were limitations on *their* power, the exceptions being those where the experience of English and American history had forcibly demonstrated that a *tendency* to abuse existed.

Cooley's Constitutional Limitations, 6th Ed., pp. 311–359, etc.

So that nearly if not quite *all* the provisions were mere *reaffirmations* of rights or privileges *already existing*, guaranteed by the common law.

CALLON VS. WILSON, 127 U. S., 540.

Indictment and conviction in the District of Columbia, without a jury, for conspiracy. Habeas corpus and discharge by U. S. Supreme Court. That in no wise fractures our theory. The grant by the States of the District of Columbia to the General Government contemplated the transfer of territory and people then within certain States to the United States, for the purpose of a seat of government, and the conclusion is irresistible that the States desired and intended to secure for this territory and its people the same protection as for the States themselves; third, the Constitution once extended over it, and has never ceased to extend over it; fourth, by the act of February 21, 1871, the Constitution and laws of the United States *were specifically extended to the District of Columbia.*

Independently of all that, the person convicted was entitled to a jury trial, regardless of the Constitution, under the *principles* of the common law. No person in this country indicted for a *crime* need appeal to the *Constitution* for a jury trial by twelve men. The *principles* of the common law, simply reaffirmed in the Constitution and amendments, award it to him.

In the above case Mr. Justice Harlan said, p. 550:

> "In *Reynolds* vs. *United States* (98 U. S., 145, 154) it was *taken for granted* that the sixth amendment to *the Constitution* secured to the people of the Territories the right of trial by jury in criminal prosecutions, and it had been previously held in *Webster* vs. *Reid* (11 How., 437, 460) that the seventh amendment secured to them a like right in civil actions at common law. We can not think that the people of this District have, in that regard, less rights than those accorded to the people of the Territories of the United States."

The point as to whether the Constitution extends *ex proprio vigore* to the Territories was not raised in *Reynolds* vs. *United States*. It could not well have been raised, for the Constitution had been specifically extended to the Territory of Utah by act of Congress (9 U. S.

Stats., chap. 51, sec. 17, p. 458). And in the case of *Webster* vs. *Reid* it was not decided that the seventh amendment applied to organized Territories. The facts were as follows: Iowa was organized in 1838. The petitioners *thereafter* were not only deprived of jury trial, but of personal service, under the provisions of an act of the Territorial legislature. The court, after quoting the seventh amendment of the Federal Constitution relating to jury trials where the amount involved is $20 or more, said: "The *organic law* of the Territory of Iowa, by express provision and by reference, *extended the laws* of the United States, including the Ordinance of 1787 (which latter, as we know, guarantee jury trial) over the Territory, but the Territorial Act prohibited trial by jury in matters of fact." It seems reasonably certain that that case was decided on the ground that our laws and the Ordinance had been extended over Iowa and not because the Constitution had been.

AMERICAN PUBLISHING COMPANY VS. FISHER, 166 U. S., 464.

The headnote to that case reads as follows:

> "The Utah law of 1892 providing that a verdict in a civil case may be rendered on the concurrence therein of nine or more members of a jury is invalid, *either* by force of the seventh amendment of the Constitution *or* by the acts of Congress (9 Stat. at Large, 458, §17) *extending the Constitution and laws* of the United States over the Territory *and* (18 Stat. at Large, p. 27, chap. 80) which provides that as to the Territories, that no party therein shall be deprived of the right of 'trial by jury in common law cases'."

Even in that case, too plain to be misunderstood, Mr. Justice Brewer said: "Whether the seventh amendment to the Constitution * * * operates *ex proprio vigore* to invalidate the Territorial statute, may be a matter of dispute." And he noted the *all-important fact* in the Webster-Reid case, that—

> "While in the opinion, on page 460, the seventh amendment was quoted, it was said: 'The organic law of the Territory of Iowa, by express provision and by reference, *extended the laws* of the United States, including the Ordinance of 1787, over the Territory, so far as they are applicable,' and the Ordinance of 1787, Article II, in terms provided that 'the inhabitants of the said Territory shall always be entitled to the writ of habeas corpus and of the trial by jury.' So the invalidity may have been adjudged by reason of the conflict with Congressional legislation."

There was no specific guarantee of personal rights in the Articles of Confederation. Who will say, however, that they did not exist?

The right to life, liberty, and the pursuit of happiness was "inalienable" under the Declaration of Independence. And the only allusion to the habeas corpus, in the Constitution even, is found in article 1, sec. 9: "The *privilege* * * * shall not be *suspended*."

That certainly assumes the existence of it *prior* to the adoption of the Constitution. The Constitution does not *grant* it, nor does it extend it anywhere. This and kindred *principles*, like trial by jury, etc., were common-law privileges, pretty fully stated in the Declaration of Independence, carried by enactment—if indeed that was necessary—into the Ordinance of 1787, into the Constitution in the manner

and for the reasons we have stated (supra) and thereafter very generally extended to the Territories. This was done not so much to remind the people of the existence of these common-law rights as to reassure them, to prevent the denial of existing privileges, to place them on *statutory* ground, clothe judges with jurisdiction, to state the practice and to place limitations on the privilege so far as the people of the States were concerned.

Rev. Stat., § 751. Ordinance of 1787.

Then Congress saw fit to grant the same jurisdiction to supreme and district judges in the organized Territories in habeas corpus cases. (Rev. Stat., § 1912.)

But neither of the sections mentioned (951–1912) undertook to *extend* the privilege anywhere, for it was already existing under our system.

In England *at common law* the writ ran to *any part* of the King's *dominions*, and the reason assigned is that it is a prerogative writ and the King ought to know why any of his subjects are imprisoned.

Church on Habeas Corpus, sec. 107.

It ran to every place under *the subjection* of the Crown.

The framers of the Constitution in Congress do not appear to have thought that the provisions respecting *personal rights* even were carried into ceded territory by mere act of cession because some or all of these rights were expressly guaranteed in the ordinance of 1787 in so many words and in the cession by Georgia.

The bill relating to Florida was framed, as to its administrative features, after that of "Orleans" Territory. It contained one section forbidding the territorial government to ignore the *personal* rights guaranteed to the people of the States by the Constitution. Mr. Montgomery, of Kentucky, tried to substitute a clause making the principles of the Constitution and all the prohibitions to legislation, as well with respect to Congress as the legislatures of the States, "applicable to the said Territory as paramount acts." This was voted down. Benton's comment on the incident is as follows (Benton's Abridgment, Volume VII, page 295, note):

> "This prompt rejection of Mr. Montgomery's proposition shows what the Congress of 1822 thought of the right of Territories to the enjoyment of *any part* of the Constitution of the United States. * * * The only question between Mr. Montgomery's proposition and the clause already in the bill was as to the tenure by which these rights should be held—whether under the Constitution of the United States or under a law of Congress and the treaty of cession. And the decision was that they should be held under the law and the treaty.
>
> "Thus a direct issue was made between constitutional rights on one hand and the discretion of Congress on the other in the government of this Territory, and decided promptly and without debate (there was no speech after that of Mr. Rea on either side) against the Constitution. It was tantamount to the express declaration: 'You shall have these principles which are in the Constitution, but not as a *constitutional* right; nor even as a grant under the Constitution, but as a *justice* flowing from our discretion, and as an obligation imposed by the treaty which transferred you to our sovereignty.'"

To lend weight to the *ex proprio vigore* theory it has been stated that "if any part of the island (of Porto Rico) levied war against the United States or adhered to our enemies, &c., they would be guilty of treason. But treason is an exclusively defined constitutional crime, and *it can not exist* on the island *unless* the Constitution that defines it is *in force there.*

That argument may appear plausible at first blush, but there are one or two considerations that seem not to have been observed by the person who made the above statement.

The Constitution (sec. 3 of article 3) simply *defines* treason against the "United States." It consists in "levying war against *them* or in adhering to *their* enemies, giving them aid and comfort."

It must become apparent that there was something omitted from this phrase, because it is very doubtful whether a person can be convicted of treason who does not owe *allegiance*, nor does the Constitution say a word as to *where* the overt act of treason must be committed. Hence, probably, we find Congress enacting sec. 5331 of the Revised Statutes, providing that "every person *owing allegiance* to the United States who levies war against them or adheres to their enemies, giving them aid and comfort within the United States *or elsewhere*, is guilty of treason."

That makes the treason clause in the Constitution complete and intelligible. It could hardly have been intended to make a person guilty of "treason" who owed the United States *no allegiance*, albeit such a person's crime, tantamount to treason, would be punished in some other way. Nor could it have been intended to allow a person owing us allegiance to escape *because* he levied war, or adhered to the enemy giving them aid and comfort from Canada, Mexico, or British Columbia. And could not Congress fully define treason making the Constitution speak its full meaning and *intent?* Allegiance is undoubtedly necessary, regardless of the *place* where the overt act is committed, and Congress has passed its own act, not in contravention of the Constitution, and it has made treason a statutory crime.

And what was to prevent that? And if we may bring a person guilty, not only of treason but of other crimes, from a foreign soil for trial may we not bring him from any place subject to our dominion and sovereignty if necessary, *i. e.*, provided we have no court there with jurisdiction to try him? The Constitution need not be over Porto Rico in order to enable us to try a person charged in that island with treason. Paragraph 2, sec. 2 of article 3, of the Constitution, provides that—

> "The trial of all crimes shall be held in the *State* where the said crimes shall have been committed, *but* when not committed in any *State* the trial shall be at such place or places as the Congress may by law have directed."

And Congress has directed. (Rev. Stat., Sec. 730.) It takes longer sometimes to dispose of a false theory than it does to state the theory.

RESULTS OF THE CONTENTION.

Keeping in view what recent and future expansion has been and may be of *tropical* or Oriental territory, no person is sagacious enough to now say what *might result* if the contention insisted upon in the pending cases was to prevail. Premature citizenship of millions of

semi-civilized people, their incorporation into the union of States, sudden loss of customs and the disruption of our *labor* and *industrial* conditions would probably result. The *States* united to form a "Union" for *their* protection and the mere fact that power is inherent or results from granted right to make war and peace to take territory, in no wise implies that the inhabitants in such ceded territory at once, or at any time, without the consent of the voting representatives of the States, become entitled to the privileges of citizens of the States.

It might happen that a concession of the theory contended for would hamper this country in making a treaty of peace. We might wish and even feel impelled to take territory by way of indemnity and yet be forced by the contention here to decline to make peace or to throw away the chance to recoup the cost of war, because of the *conditions* which would at once attach to a cession.

Contendents in the court below insisted that so much of the Paris treaty as allowed Spain free trade in the Philippines for ten years was void. There was a similar clause (article 15) in the Florida treaty of 1819 with Spain. Also in the Louisiana treaty of 1803, article 7. And yet to sustain the contention here contendents seemed forced to extend their argument to this attack on the treaty-making power. We understand the law to be as follows:

> "A treaty is the law of the land. It is equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a *contract*—when either of the parties engages to perform a particular act, the treaty addresses itself to the *political*, not the judicial department, and the legislature must execute the contract before it can become a rule for the court." *Foster* vs. *Neilson*, 2 Peters, 245.

THE CROSS-HARRISON CASE.

Why did the court in the Harrison-Cross case (16 Howard) say: "Inasmuch as there is nothing in *the treaty* with respect to commerce, California became instantly bound and privileged (*i. e.*, after ratification) by (then) existing tariff laws"? Because as against *foreign* nations or *foreign* products our *laws* regarding *foreign* products took effect, and of course those (revenue) laws were "uniform" as against *such* products—had been made so by constitutional requirement. What more? From the language of the court the fair inference is that if the treaty had differently provided the treaty stipulation would have prevailed, as in case of the commerce clause in the treaties with Louisiana, Florida, and now with the Philippines. What, then, becomes of the theory of contendents that the commerce clause in the treaty with Spain with regard to the Philippines is void! No court has ever held—where its mind was on the vital point in issue—that the uniform clause prevailed over a treaty regarding territory. In other words, the "United States" did not comprehend our whole country even in case of *foreign* products where the treaty otherwise specified. Why? Because as to territory the uniform clause has no application.

We did not collect duty on *foreign* goods in the case of *Cross* vs. *Harrison*, 16 Howard, 164, because the *Constitution* extended over California. The duty collected in that case *prior* to the treaty of peace was held lawful as the exercise of the war power. It was a belligerent

right, and a military contribution tariff prevailed. 2d. As to the duty collected during the two months *after* cession and ratification of the treaty and *before notice* thereof had been given the military power, that was held lawfully collected because there were no Executive instructions to the contrary nor any revocation of previous Executive instructions of March and May, 1847, and because those locally within the jurisdiction of the military or provisional government were bound by the military tariff and Executive instructions, and because no one could claim "a right to introduce into the territory of that (military) government *foreign* merchandise without the payment of duties which had been originally imposed under belligerent rights (simply) because *the territory had been ceded* by the original possessor and enemy to the conqueror, or that *the mere fact* of a territory *having been ceded* by one sovereignty to another opens it to a free commercial intercourse with all the world, as a matter of course, until the possessor has legislated some terms upon which that may be done. There is no such commercial liberty known among nations."

Then as to duties collected *after* notice given of ratification of the treaty of peace, and before the passage of an act (1849) extending our revenue laws over California, the court held that without legislation by Congress the *municipal* laws and usages that prevailed before the cession were in force, but the provisional or military government which had its origin in the lawful exercise of a belligerent right "did not cease as a matter of course nor as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is that it was meant to be continued *until it had been legislatively changed.* No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with *the true policy of the Government.* And the more so as *it was continued until the people of the Territory met in convention* to form a State government. * * * Our conclusion from what has been said is that the civil (or provisional) government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty or from its ratification. We think it was continued over a ceded conquest without any violation of the Constitution or laws of the United States, and that *until Congress legislated for it* the duties upon *foreign* goods were legally demanded and received."

Then it was claimed that no duties were lawfully collectible on the *foreign* goods entering between February 3, 1848, the date of the treaty of peace, and March 3, 1849, the date when Congress included California within a collection district, nor between the last-mentioned date and November 12, 1849, when the collector appointed took office.

The theory was that there was no positive direction or clause for the collection of duties during that time.

(2) That duties were illegally exacted, because all the laws of a ceded country, *including those of trade*, remained unchanged until the new sovereignty changed them.

(3) That as Congress had the constitutional power to regulate commerce and had not done so *specifically* as to California, there was no law that would enforce payment of duties.

(4) That our revenue laws covered only so much of the country as had been divided into collection districts, and that beyond them no authority had been given *to prevent* the landing of *foreign* goods or to charge duty on them.

The court answered these points by saying:

(1) That for seven months duties had been collected under the war tariff prior to treaty.

(2) Collection districts and ports of entry are mere designated localities at and within which Congress has extended a liberty of (foreign) commerce; all ports to which this liberty is not extended are withheld. To introduce goods *elsewhere* is a violation of a nation's *sovereignty*. No express law to emphasize that is necessary, the expressed allowance being the limit of the liberty extended *foreigners* to trade with such nation. "Upon *this principle* plaintiffs had no right to trade with California with *foreign* goods, excepting under permission of the United States under the civil government and war tariff which had been established there, and *when the country was ceded* as a conquest by a treaty of peace *no larger liberty* of trade resulted."

The court further held that after the cession California became bound and privileged, as to *foreign* commerce, by *the laws* (not Constitution) that Congress had enacted to raise revenue—*i. e.*, bound by the 18th section of the act of March 2, 1799, which not only embraced the ports named therein, but which was applicable to ports that we might *thereafter* have and be made ports of entry, and which act *excluded* all other ports not made ports of entry and delivery; that that *act* and the act of July 20, 1790, were in force in California *without express legislation*. The court said:

> "The *sovereignty* of a nation regulates trade with *foreign* nations, and none can be carried on except as the sovereignty permits it to be done."

The court did say, speaking, of course, of *foreign* commerce, that—

> "The right claimed to land *foreign* goods within the United States at *any* place out of a collection district, if allowed, would be a violation of that provision of the Constitution which enjoins that all duties, imposts, and excises shall be uniform throughout the United States."

And so it would have been. *Geographically* as to *foreign* commerce California was a part of the United States.

V.

THE INDUSTRIAL FEATURE.

There is an *industrial* phase of this question in which the States are deeply concerned. War is always possible and, as was shown in the recent case of our trouble with Spain, no man can foresee its results. Suddenly, and for the first time in our history, the nation finds itself possessed of vast and even unexplored areas of *tropical* territory, *populated* by millions of people of the Latin and Malay races, who have long been accustomed to monarchical or no government ideas and either not ruled at all or with despotic power, many of them only semicivilized. The *areas* of the ceded possessions are given over to the production in abundance of such products as tobacco, sugar, hemp, rice, and fruits, for which the climate and soil are best adapted, and

which, therefore, and because of cheap labor conditions, can be raised therein at comparatively small cost.

There is no treaty obligation resting upon the United States to extend such people the privileges which the people of our States enjoy, and in the passage of the bill for Porto Rico Congress has been quite observant of the things mentioned, refraining from creating or even calling it *a* "territory," and extending it only that measure of legislation which in its judgment was "needful" and best adapted to the conditions.

In this connection the language of this court in 5 Wallace, p. 469, is pertinent. It said:

> "Arguments drawn from *public policy* have large influence where the course of legislation leaves no doubt as to what that policy is."

Now, what has been our policy in regard to the agricultural and finally other productions of this country? From the very inception it was *protective* as against the dangers that were apprehended from rival nations. Our whole history is replete with laws enacted not only for revenue, but evidently to develop and protect our domestic industries, and agriculture, on which every country must largely depend, was first selected to receive the benefits of this legislation.

Gradually the sphere of this policy has developed until on nearly every agricultural product is placed a customs duty; and this is especially the case with the products we have mentioned, that have the advantages already noted in the tropics over those at home that compete therewith.

These industries in the States employ thousands of men and millions of capital are invested therein. They have long been assured of the friendship of the Government by our tariff laws. They can be disturbed and even ruined in three ways:

1. By a reduction of duty;
2. By the effect of "reciprocity" treaties with nations having *competing* products; or by,
3. Cessions of territory growing such products, providing our revenue laws, *eo instanti* and without the assent of Congress, extend to such cessions.

We are free to say that the framers did not foresee the existing conditions as to the scope of territorial acquisitions, much less, probably, *the character* thereof, but we strenuously insist that they did not purpose to frame a Constitution too structurally feeble to resist encroachments from whatever point they might proceed. This was so not only with the Union of States, so clearly demonstrated in the lodgment of the war power, but in investing Congress with the absolute power of taxation and to regulate commerce.

They went even further than that. So intent were they upon affording ample power to protect home industries that they granted to the individual *States*, with the assent of Congress, the power *to lay duties on imports and exports.*

> Article 1, paragraph 2, sec. 10.

And this court has told us *why* that was done. In 8 Wallace, p. 133, it said:

> "The framers of the Constitution, claiming for the General Government, as they did, all the duties on *foreign* goods imported

into the country, might well permit *a State*, that wished to tax more heavily than Congress did, *foreign* liquors, tobacco, or other articles injurious to community, *or which interfered with its domestic policy, to do so*, provided such tax met the approbation of Congress and was paid into the Federal Treasury."

There can therefore be no sort of doubt about the policy which it was the intent of the framers to incorporate, as far as it was possible, into the Constitution for exercise or not as Congress and the States thought proper.

[We would here remark, incidentally, that there can be no pretense that *territory* could make any such appeal to Congress, and yet this clause is very closely associated with the general taxing clause in sec. 8.]

This grant of power was *protective*, clearly so, and not for revenue. It was a qualification, by compromise in the convention, on the absolute transfer of power by the States to the General Government to tax imports. (8 Wallace, p. 134.) Mr. Madison opposed it; he wished to make the power to tax run absolutely to the Government; to entirely prohibit the States, but he failed. It left Congress with a free hand, not only to raise revenue and protect the whole body of States, but any individual State against an influx of *competing* products. Why then interpret the Constitution as extending, for *domestic* purposes, to acquired territory, from which the dangers are almost as imminent as from foreign countries? What requires it? What necessity arises for it?

It would be strange that with the ample grant of power to protect the Union of States by the commerce clause and the individual States by sec. 10 against the entry of competing goods from *foreign* countries that it has no power under them and the "needful" rule and commerce clause, and the sovereign power to govern, to protect the States from *such* goods from acquired territory! We may well have extended our revenue laws to former acquisitions that had no competing articles. The more reflection given this matter the deeper becomes the conviction that the power under the "needful" clause, the commerce clause, and that resulting from the power to acquire, carry with them, as against any strained interpretation of any other clause, political and discretionary authority.

Nor should the fact be overlooked that the theory here of the contendents could operate to suddenly and materially decrease our revenues without the consent of Congress. Taxation and protection, through the cession of territory, could be relegated, by indirection, to the treaty-making power which has the right to acquire. Can revenue results, carefully calculated—7 Howard, 283, pr. McLean, Jus.—be suddenly and seriously impaired by mere cession of territory?

The Constitution has stood storms and tempests, and it confronts one now of greater proportions than at first glance may appear, and while it remains stable it is an instrument progressive and also protective of the Union of *the States*. It was not designed to carry the seeds of its own destruction.

It is quite certain that other nations have the right, and exercise it, to impose duties on colonial products, generally giving the latter, however, an advantage over *foreign* products from other nations. Nor do they allow colonial products to enter "free," *especially if they compete with products of the parent country*. If Congress does not

possess this power it might, as we have said, become exceedingly difficult for us to maintain the *protective* policy as against the treaty-making power and encourage or even maintain existing home industries. In this case those products happen more especially to be tobacco, sugar, hemp, fruits, and rice. The depletion in our revenue might necessitate the levying of heavy *internal-revenue* taxes to fill the vacuum produced by the colonial "free trade" contention. We may have come to be a "world power," but if the contention here asserted is true we are without the necessary power to protect ourselves from the results which may readily flow therefrom.

Every nation in the world maintains the existence of and asserts its power to tax the products from its colonies or acquired territory. Every great nation in the world is expending large sums of money annually in the effort to produce its own supply of sugar—one of the home products that would be seriously affected, if not ruined, eventually, if the doctrine contended for here prevails. Germany, Russia, France, Austria-Hungary, Belgium, Holland, and lastly Sweden, Italy, and Spain, have deemed it wise to secure their own sugar from their own soil and *not jeopard that policy by the incorporation of tropical territory.* Even Great Britain, which is unable to grow the raw material for sugar in the Kingdom, allows India to countervail the sugar bounties laid by other (rival) governments. The policy of this Government has been emphasized in the same direction, especially since 1890.

We feel that this court will be able to see its way clear to determine that this nation is strong enough to protect the Union of the *States* and the industries of the people therein, even while we may be advancing to a supremacy that astonishes the world.

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